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No. 95-1136

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

GREGORY MURRAY,

*Petitioner,*

*vs.*

DETROIT RIVERVIEW HOSPITAL, DETROIT-MACOMB HOSPITAL CORP., DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES(AFL-CIO), *a labor organization, and* MICHIGAN AFSCME COUNCIL 25 (Afl-Cio), *a labor organization,*

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS DETROIT-MACOMB HOSPITAL CORP. AND DETROIT RIVERVIEW HOSPITAL

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## QUESTIONS PRESENTED

1. Whether the Union engaged in wholly irrational conduct that was outside the wide range of reasonableness accorded to it when it interpreted the Collective Bargaining Agreement as not requiring it to provide notice to the arbitrator simultaneously with its demand for arbitration.

2. Whether this Court, in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991), created a new test for determining when a union breaches its duty of fair representation thereby eliminating the longstanding standard first set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967).

## PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court below are listed in the caption. Detroit-Macomb Hospital Corporation operates a facility known as Detroit Riverview Hospital. Although Detroit Riverview Hospital has been named as a party in this matter, it is not a separate legal entity.

Detroit-Macomb Hospital Corporation is not a subsidiary of any other corporation. It has the following non-wholly owned subsidiaries: Selectcare Health Insurance Company; Macomb MRI; Wayne Macomb MRI; and Michigan Hospital Association Insurance Company.

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## COUNTERSTATEMENT OF THE CASE

### A. Procedural History.

Petitioner brought this § 301[1] case alleging that his employer breached the Collective Bargaining Agreement when it discharged him and that his Union breached its duty of fair representation when it failed to adopt the employer's interpretation of the Collective Bargaining Agreement on the issue of dual notification of intent to arbitrate of an admittedly ambiguous provision of the contract which is subject to conflictive interpretation. (R. 1).

The facts in this case relating to the Union's processing of Murray's grievance were identical to the facts in *Baker v. Detroit-Macomb Hospital Corp.*, 834 F. Supp. 216 (E.D. Mich. 1993), *aff'd*, 57 F.3d 1069 (6th Cir. 1995). Because no material facts were disputed with respect to the issue of whether the Union had breached its duty of fair representation, the parties agreed to rely on the discovery conducted in the *Baker* case and to stay discovery in the instant case pending Cross Motions for Summary Judgment on that issue. (R. 10). Judge Anna Diggs Taylor of the Eastern District of Michigan granted Respondents' Motions and denied Petitioner's Motion for Summary Judgment concluding that the Union's refusal to accept the employer's interpretation of the contract was not a breach of the Duty of Fair Representation. (R. 32). Judge Taylor also denied Petitioner's Motion for Leave to file a Second Amended Complaint which had been filed concurrently with the Motions for Summary Judgment. (R. 31).

The Court of Appeals for the Sixth Circuit affirmed the

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1. Section 301 of the Labor-Management Relations Act. 29 U.S.C. § 185(a).

District Court's rulings. (Resp. App. 8a). Petitioner's Request for Rehearing and Suggestion for Rehearing En Banc were also denied by the Sixth Circuit. (Resp. App. 9a). Petitioner then filed his Petition for Writ of Certiorari with this Court.

**B. Statement Of Facts.**

Gregory Murray was employed by Detroit-Macomb Hospital Corporation (the "Hospital") in Detroit Riverview Hospital's Patient and Public Reception Department.[2] Murray was terminated on April 1, 1991, for leaving his post without being relieved.[3] Murray's employment was covered by a Collective Bargaining Agreement (the "Agreement") between Detroit Riverview Hospital and AFSCME, Michigan Council 25, Local 2435 (the "Union"). The Agreement provided for a grievance and arbitration procedure to resolve Union members' concerns regarding discipline up to and including discharge. In accord with the Agreement, the Union filed a timely grievance on Murray's behalf on April 5, 1991. The Hospital timely denied Murray's grievance by its Step 4 response dated April 19, 1991.

The Agreement contained an expedited procedure for appealing grievances over disciplinary discharges to arbitration if the matter was not resolved at the Step 4 level. This expedited procedure, which goes to the heart of this case, provided as follows:

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2. Detroit-Macomb Hospital Corporation owns and operates two hospitals. In addition to Detroit Riverview Hospital, which is located in Detroit, Michigan, it also operates Macomb Hospital Center in Warren, Michigan.

3. Although Petitioner contends that he was wrongfully discharged as a matter of law, that issue was never before either of the lower courts. Instead, all of the parties to this matter agreed to limit the courts' review only to the issue of whether the Union had breached its duty to the Petitioner. (R. 10).

> If the grievance is not resolved at Step 4, either party may give notice to the other party of its intent to arbitrate such grievance. Such notice shall be given within fourteen (14) calendar days (including Saturdays, Sundays and holidays) of the receipt of the Hospital's Step 4 answer. Arbitration demands shall be filed in one of the following ways:
>
> (1) grievances involving layoff, recall from layoff, discharge or disciplinary suspension shall be processed through an expedited procedure. These grievances shall be heard by an arbitrator drawn from a preselected list of five (5) mutually agreed upon names . . .
>
> (a) Upon filing a demand for arbitration, it shall be submitted to an arbitrator selected on a rotation basis from the jointly agreed upon list. . . .

(R. 11, Exhibit A to the Hospital's Brief in Support of Motion for Summary Judgment, Article V, Section 4, Step 5). It is undisputed that the Union gave a timely notice of its intent to arbitrate to the Hospital within the 14-day time limit. This dispute arose out of the issue of whether the Union was required to provide dual notification within the 14-day period by notifying *both* the Hospital and the Arbitrator of its intent to arbitrate. The Union asserts that it complied with the time limits by notifying the Hospital and that the contract imposed no time limits for actual notice to the Arbitrator. The Hospital contends that dual notification is required within the 14-day period. Although both the Hospital and the Union vigorously contend that "their" interpretation is the correct one, neither side disputes

that the language in section (1)(a) is ambiguous. The language of (1)(a) is in the passive voice and does not identify who is responsible for submitting the grievance to arbitration nor does it state specifically when the arbitrator must be informed of the demand.

The Union and the Hospital disagreed about the meaning of paragraph (1)(a) almost from the very first day that it was implemented. The Hospital has always interpreted the language to mean that, within fourteen days of the Step 4 Response, the Union is required not only to notify the Hospital of its intent to appeal the grievance to arbitration but also must provide dual notification to the preselected arbitrator. (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment).

The Union, on the other hand, has just as steadfastly insisted that its only obligation is to file an arbitration demand. The Union contends that it has no obligation to notify the arbitrator of his or her selection claiming, instead, that either party may notify the arbitrator if it wishes to push the matter forward more quickly. (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment, pp. 31, 37-38, 40, 46, 48). The Union further claimed that, because the provision does not set forth an express time limit during which the arbitrator must be notified of his or her selection, the arbitrator can be notified at any time. The Union has consistently interpreted the Agreement in this way with respect to all grievances filed prior to, at the same time as, and after the Murray grievance. (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment, p. 66). Needless to say, because of the diametrically opposing viewpoints of the parties to the Agreement, the issue was far from settled and prior to the filing of Murray's grievance, had never previously been examined by an arbitrator. (R. 11,

Exhibit D to the Hospital's Brief in Support of Motion for Summary Judgment, pp. 62-63, 66-67).[4]

The Union timely notified the Hospital of its demand to arbitrate on May 1, 1991 after receiving the Hospital's Step 4 response denying Murray's grievance dated April 19, 1991. (R. 11, Exhibit E to the Hospital's Brief in Support of Motion for Summary Judgment). However, in conformity with the Union's consistent interpretation of the contract, it did not notify the arbitrator of its intent to arbitrate Murray's termination grievance until later.

When the Hospital discovered that the Union had not notified the arbitrator at the same time that it filed its Arbitration Demand, the Hospital informed the Union that it would not proceed with the matter because it was the Hospital's position that the Union's failure to provide simultaneous notification to the arbitrator of its arbitration demand rendered the demand untimely. The Hospital also informed the Union that, because the demand was untimely, it considered the grievance settled. (R. 11, Exhibit F to the Hospital's Brief in Support of Motion for Summary Judgment).

In an attempt to force the Hospital to proceed, the Union filed a Charge, on June 12, 1991, with the Michigan Employment Relations Commission ("MERC") seeking to compel the Hospital to arbitrate Murray's grievance.[5] (R. 11, Exhibit D to the Hospital's Brief in Support of Motion for Summary

4. As discussed, *infra*, pp. 6-7, the timeliness issue was decided by two separate arbitrators during the pendency of Murray's grievance. One arbitrator decided in favor of the Union and one arbitrator decided in favor of the Hospital with respect to the issue.

5. This Charge was dismissed on jurisdictional grounds because it was filed with the wrong agency. (R. 11, Exhibit D to the Hospital's Brief in (Cont'd)

Judgment, p. 49). When the Charge was dismissed, the Union brought its legal counsel into the fray in an attempt to compel arbitration. After months of posturing, the Union and the Hospital ultimately entered into an Agreement to arbitrate the grievance in a bifurcated manner, with the issue of arbitrability to be decided first. (R. 11, Exhibit G to the Hospital's Brief in Support of Motion for Summary Judgment). At that point in time, the Hospital wrote a letter to Arbitrator Frost, on behalf of both parties, informing her of her selection as arbitrator over this matter. (R. 11, Exhibit H to the Hospital's Brief in Support of Motion for Summary Judgment).

In accordance with the parties' Agreement, an arbitration proceeding on Murray's termination grievance convened before Arbitrator Frost on January 11, 1993. Neither the Hospital nor the Union wavered from their interpretation of the contract at any time during the arbitration process. Instead, both Parties vigorously and consistently tried to prove that their interpretation of the language was the correct one. On February 11, 1993, after conclusion of the hearing and after reviewing the post-hearing briefs, Arbitrator Frost issued her decision in which she held that Murray's grievance was not arbitrable. (R. 11, Exhibit I to the Hospital's Brief in Support of Motion for Summary Judgment). Arbitrator Frost concluded that the Hospital's interpretation was correct and that the Union should have notified the arbitrator immediately upon or shortly after making its demand for arbitration in May of 1991.

In addition to Arbitrator Frost, two other arbitrators have also been called upon by the parties to decide this particular issue

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(Cont'd)

Support of Motion for Summary Judgment, p. 49). However, because the Charge only sought to compel arbitration, something which ultimately occurred, Murray was not injured by the misfiling.

of dual notification. In a case involving Regina Shorter, Arbitrator Daniel upheld the Union's position by his decision dated April 2, 1992. (R. 11, Exhibit J). In the other arbitration, that of Darlene Baker's grievance, Arbitrator Glendon upheld the position of the Hospital by his decision dated April 18, 1992. (R. 11, Exhibit K). All three Arbitrators ruled that the party initiating arbitration was required to notify the Arbitrator. However, that is where the similarities ended. Arbitrator Daniel found that the Union had properly invoked Step 5 because the Agreement did not contain any time limits for notifying the Arbitrator, nor did it contain any forfeiture clause for failing to make the submission to the Arbitrator. According to Arbitrator Daniel, once the Union had initiated Step 5 by filing its Arbitration Demand, the Union had preserved its rights and the Section 3 forfeiture clause had no effect. The other two Arbitrators concluded that in order to institute Step 5, the initiating party had to notify the Arbitrator soon after filing its Arbitration Demand.

## REASONS FOR DENYING THE WRIT

### A. Overview.

According to Supreme Court Rule 10, review on a Writ of Certiorari is only to be granted in very limited situations. Petitioner has identified three reasons why a Writ should be issued: (1) that there exists a split in the Circuits; (2) that the Sixth Circuit's affirmance of the District Court's Judgment was contrary to this Court's ruling in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 449 U.S. 65 (1991); and (3) because a missed deadline is a breach of the duty of fair representation as a matter of law. As the following discussion will show, however, Petitioner's argument is seriously flawed.

Despite the Petitioner's attempt to show otherwise, there

clearly is no split among Circuits in this matter. This is a run-of-the mill Section 301 hybrid case. The rules governing such cases have not changed in any relevant respect since *Vaca v. Sipes*, 386 U.S. 171 (1967). Although Petitioner contends that the lower courts' decisions conflict with decisions of this Court and the decisions of other Circuits, the undisputed facts show otherwise. Here, Petitioner has alleged no more than negligence on the part of his Union because of the Union's refusal to accept the Hospital's interpretation of the contract. This Court, in conjunction with all of the Circuits cited by Petitioner, has consistently held that mere negligence is insufficient to support a claim alleging a breach of the duty of fair representation. *United Steelworkers v. Rawson*, 495 U.S. 362 (1990). *See also Achilli v. John J. Nissan Baking Co.*, 989 F.2d 561 (1st Cir. 1993) (mere negligence is not enough to show a breach of the duty of fair representation); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981) (ordinary negligence, without more, cannot establish a breach of the duty of fair representation).

Similarly, Petitioner's claim that the decision of the Eastern District of Michigan and the Court of Appeals for the Sixth Circuit conflict with this Court's decision is also without merit. Petitioner contends that the District Court's decision was incorrect because it ruled that the Union had not breached its duty because its actions were not wholly irrational. However, the District Court's decision was appropriate since this Court, in *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 U.S. 65 (1991), specifically stated that a Union's conduct may "constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a wide range of reasonableness, . . . that it is wholly 'irrational' or 'arbitrary'." *Id.* at 67. Thus a finding that the Union's conduct was not wholly irrational was both factually correct and consistent with the precedents set by this Court.

Similarly, Petitioner's claim that the Sixth Circuit

improperly utilized a rational basis test instead of the standard set forth by this Court is likewise without support. In fact, the Sixth Circuit cited this Court's own language when it identified the standard to be applied to this case:

> To succeed, he must show that the Union's conduct was "arbitrary, discriminatory or in bad faith". *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "[A] Union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the Union's actions, the Union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) . . . .

(Resp. App. 5a).

The Court of Appeals ruled that Murray could not meet that standard because the contract's language was ambiguous. The Sixth Circuit noted that while other parts of the contract imposed specific duties on specific individuals, provision (1)(a) did not. As a result, the Court of Appeals concluded that the Union's interpretation was a sensible one despite Murray's unsupported speculation of wrongdoing, and properly held that the Union's conduct was not a breach of the duty of fair representation.

Murray's final contention is that the Sixth Circuit's decision was contrary to the established rule that a failure to meet a contractual deadline is a breach. This claim is not supported by the facts. All parties agree that the language is ambiguous and does not provide a time limit for notifying the arbitrator. Moreover, the Union *did* comply with the only unambiguous time limit in the Agreement, that of filing an Arbitration Demand with the Hospital within the 14-day time period. Accordingly,

Petitioner's argument has no application whatsoever to the instant case. As such, and as this Court has consistently held since its decision in *Vaca*, Murray cannot prove a breach of the duty of fair representation under the facts presented here due to the absence of arbitrary conduct by his Union. Accordingly, this Petition should be denied.

**B. The Undisputed Facts Did Not Show A Breach Of The Duty Of Fair Representation By The Union.**

Judicial review of contractual grievance proceedings has been limited by the courts because federal labor policy encourages the private resolution of labor management disputes. As this Court is well aware, one of the limited circumstances in which a court can entertain an employee's action against his employer for breach of the Collective Bargaining Agreement is where the employee also alleges and proves that his Union breached its duty of fair representation in the processing of his grievance.

Because of the well established judicial deference to the remedies established by the parties for resolution of contractual disputes, the standard applied in fair representation cases is strict. The classic definition of the standard was set forth in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967):

> A breach of the statutory duty of fair representation occurs only when the Union's conduct towards a member of the Collective Bargaining Unit is arbitrary, discriminatory, or in bad faith.

Even though this Court has consistently held that negligence alone is insufficient to rise to the level of arbitrary conduct by the union, Petitioner contends that this Court's

decision in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 449 U.S. 65 (1991) eviscerated *Vaca* and created a new and higher duty for unions. According to Petitioner, unions are now held to the standards applicable to trustees and fiduciaries. While it is undisputed that a union acts in a pseudo fiduciary relationship to its members, this Court has never held that a union breaches its duty whenever its conduct could be construed as a mere breach of a fiduciary duty to one of its members. Moreover, even though it is the relationship between a union and its members that creates the union's duty of fair representation, the existence of such a relationship is not the standard for determining whether a breach of the duty of fair representation has occurred.

Instead, as this Court is well aware, *O'Neill* simply reiterated and explained the standards set forth in *Vaca* rather than eliminating them. In fact, *O'Neill* specifically requires that Petitioner show that his union's actions were "so far outside a wide range of reasonableness," as to be "wholly irrational" or "arbitrary" in order to prevail on his claims. *Id.* at 67.

By definition, when a union makes a specific decision as to its strategy in handling a particular grievance, this decision cannot constitute a breach of the duty of fair representation. Such a decision, even if ultimately determined to be mistaken, cannot be arbitrary or, in the words of the Supreme Court, "wholly irrational." *Id. See also, Ethier v. Postal Service*, 590 F.2d 733 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979) (No breach of the duty where union steward "pursued the grievance with vigor and erred only in failing to anticipate how the Agreement would ultimately be construed by an arbitrator").

All parties agree that the Union's decision on when to notify the Arbitrator was not a mistake or a missed filing deadline. Instead, the Union demanded arbitration in a timely manner and interpreted the contract as not requiring it to inform the

Arbitrator at the same time. It is undisputed that the Union has consistently taken the same position in all grievances.[6] As Judge Gadola of the Eastern District of Michigan stated in a similar case:

> As a matter of law, however, the Union's conduct was anything but irrational. The Union's conduct was well within the wide range of reasonableness allowed by the Supreme Court. Although Plaintiff calls the Union's conduct "extremely risky", two weeks before Plaintiff's grievance was decided, a different arbitrator decided in favor of the Union's interpretation. After examining the relevant provision of the CBA, the Court is unable to declare that either interpretation of the grievance procedure is so clearly correct that an opposite contention would be irrational.
>
> Furthermore, rather than constituting arbitrary conduct, the Union's adherence to its position was long-standing and

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6. Murray contends that he has proof of arbitrary conduct because the Union withdrew its Arbitration Demands on six occasions when the Hospital objected on timeliness grounds. In making this contention, however, Murray presupposes a number of facts not supported by the evidence. First of all, there is no evidence that the six discharge cases represent all of the cases filed by the Union. In fact, the undisputed facts before the trial court showed that the Union did not withdraw its Demands in at least three cases, those of Murray, Baker and Shorter. Next, there is no evidence that the Union considered the grievances, where it withdrew its demands, to be meritorious. Finally, Murray provided no evidence that the Union withdrew its Demands because it believed that its interpretation of the contract was insupportable. Because Murray's contentions were not supported by any admissible evidence, they were properly ignored by the District Court.

> consistent. The Union followed its interpretation of the CBA for over four years. *Id.* at 10-11.

*Baker v. Detroit-Macomb Hospital Corp.*, 834 F. Supp. 216 (E.D. Mich. 1993), *aff'd*, 57 F.3d 1069 (6th Cir. 1995).

In this case, the relevant inquiry is whether the Union's conduct was arbitrary. Here, there is no evidence of any arbitrary conduct by the Union. Murray was terminated for an offense, leaving his workstation without relief, which was grounds for termination under the Hospital's work rules. The Union, nevertheless, tried to get Murray reinstated. It processed his grievance, it demanded arbitration, it threatened litigation and, ultimately, prevailed in having the issue of timeliness arbitrated. The Union's conduct simply was not arbitrary. All that has been presented here is that a long-standing interpretation by the Union as to the requirements for perfecting an appeal to arbitration was rejected by Arbitrator Frost. While the Union was not successful in convincing this specific arbitrator that its position was correct, it has convinced another arbitrator of the reasonableness of its position and had taken the same stance in previous grievances.

Under these circumstances, the Union's conduct was not arbitrary or wholly irrational and the lower courts properly dismissed Petitioner's claims.[7]

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7. Finally, the National Labor Relations Board ("NLRB"), the federal agency charged with the administration of the National Labor Relations Act and oversight of labor relations, rejected the Petitioner's theory of a breach of the duty of fair representation on precisely the same facts. (R. 14, Exhibit L to the Union's Brief in Support of Motion for Summary Judgment). There, Darlene Baker charged that the Union failed to represent her fairly because it had not provided dual simultaneous notification to the arbitrator. The Board dismissed the charge on the grounds that the Union's conduct was not perfunctory or arbitrary but that the Union was actively attempting to compel the employer to arbitrate the grievance.

**C. The District Court Did Not Abuse Its Discretion When It Refused To Grant Petitioner Leave To File His Second Amended Complaint.**

On December 13, 1993, the same day that the Petitioner filed his Motion for Summary Judgment and after the Respondents had filed their Motion for Summary Judgment, Murray also filed a Motion for Leave To File Second Amended Complaint. By this Complaint, Murray sought to add a claim against his Union for misfiling the charge with the MERC in 1991. By his Declaration, he contended that he knew of the misfiling in November of 1991. In an attempt to avoid the statute of limitations problem, Murray claimed that the Union's conduct of intentionally concealing and failing to inform Murray of its negligent misfiling, even though the Union learned of the misfiling while there was still time to refile the charge with the NLRB, was a breach of the duty of fair representation.

Both the District Court and the Sixth Circuit found that Murray's proposed Second Amended Complaint was both futile and time barred on the following bases. It is undisputed that the Union filed an unfair labor practice charge and threatened litigation to compel arbitration in an attempt to get the Hospital to proceed to arbitration. While the Union misfiled its charge with the MERC instead of the NLRB, no one disputes that the Union, ultimately, was successful in forcing the Hospital to arbitrate the parties' disputes.

Since the Union was successful, Murray was not harmed by the mistaken filing. The fact that Murray cannot identify any injury caused by the misfiling compels the conclusion that the Union's conduct was not a breach of its duty of fair representation. In fact, the record reflects that the Hospital agreed to arbitration only after litigation was threatened and after the Union involved its attorneys in this matter.

Because mere negligence on the part of a Union is insufficient to state a claim for violation of the duty of fair representation, Murray's Motion For Leave To Amend was properly denied. *United Steelworkers v. Rawson*, 495 U.S. 362 (1990). Based upon Murray's failure to provide evidence that the misfiling was anything other than a mistake, he cannot prevail on this claim.[8]

Murray's claim that the Union's alleged failure to inform him of the misfiling and subsequent dismissal was a breach, is similarly meritless. While the time limit for filing an individual charge against the Hospital may have, arguably, passed by the time Murray found out about the dismissal of his charge, Murray still had plenty of time to file a charge with the NLRB *against the Union* premised upon the misfiling. Nonetheless, Murray chose not to do so, probably because he was aware that the Union had successfully compelled the Hospital to arbitrate. As a result, he cannot show a breach on this basis either.

Finally, any claim that the Union's misfiling was a breach was barred by the statute of limitations. It is well settled that duty of fair representation claims must be filed within six months of their accrual. *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). In his Declaration, Murray candidly admits that he knew of the Union's mistake by November of 1991. (R. 13, Declaration of Gregory Murray, ¶ 15). Nonetheless, he sat back, allowed the arbitration to proceed, waited for the results and when he lost, filed his initial Complaint on August 11, 1993, filed his First Amended Complaint on August 16, 1993 and never once raised this claim. It was not until after the Hospital moved for Summary Judgment that Murray finally raised the issue. However, because the claim

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8. Moreover, even if Murray had been injured, the NLRB had already concluded that this misfiling was not a breach. *See supra*, note 7.

was time-barred when he raised it, the Motion for Leave to Amend was properly denied.

The appeals court did not err when it refused to reverse the District Court's ruling because Murray's proposed amendment would have been futile, was time barred and would have prejudiced the Respondents. Accordingly, this Petition must be denied.

## CONCLUSION

This is a case where the Union consistently interpreted the Contract as allowing it to preserve its rights simply by filing an Arbitration Demand. The fact that the Hospital wanted to expedite the process and believed that it had negotiated such a process, does not compel the conclusion that the Union acted improperly by not capitulating to the Hospital's interpretation of the admittedly ambiguous language. Murray has not provided this Court with any cases that have held that the Union has an obligation to concede all disputes with the employer immediately simply because the employer may take a stance contrary to the Union. In fact, the cases cited by Murray compel that just the opposite is true.

Here, the Union consistently followed a long-standing interpretation of the contract. The fact that the employer disagreed with the Union's interpretation does not render the Union's conduct wholly irrational. Because Murray provided no evidence of arbitrary conduct by his Union, his complaint was properly dismissed. Accordingly, the Hospital requests that this Court deny this Petition For Writ Of Certiorari.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 29, 1995**

**No. 94-1187**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

GREGORY MURRAY,

Plaintiff-Appellant,

v.

DETROIT RIVERVIEW HOSPITAL; DETROIT-MACOMB HOSPITAL CORP.; DETROIT RIVERVIEW HOSPITAL WORKERS LOCAL 2435, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES(AFL-CIO), *a labor organization; and* MICHIGAN AFSCME COUNCIL 25 (AFL-CIO), *a labor organization,*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

**NOT RECOMMENDED FOR FULL TEXT PUBLICATION.** Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

*Appendix A*

**BEFORE: BROWN, KENNEDY** and **NORRIS**, Circuit Judges.

**ALAN E. NORRIS, Circuit Judge.** Plaintiff Gregory Murray brought this hybrid suit against Detroit Riverview Hospital and the union that represented him, Detroit Riverview Hospital Workers Local 2435, after the hospital terminated his employment. The district court granted summary judgment in favor of defendants, and Murray appealed.

I.

The hospital fired Murray on April 1, 1991 for allegedly breaking a work rule. He contends that the firing was in retaliation for his activities as a steward of the union, which is a local affiliate of the American Federation of State, County and Municipal Employees (AFSCME) and Michigan AFSCME Council 25 (Council 25).

The 1988 through 1990 collective bargaining agreement (CBA) between the hospital and the union established a special procedure for the resolution of employee discharge grievances. Under that procedure, if the union was dissatisfied with the answer provided by the hospital at the fourth step of the grievance procedure, it was required to present an arbitration demand to the hospital within fourteen days of receipt of the hospital's answer. In the CBA provision at the center of this controversy, it continued, "Upon filing of a demand for arbitration, [the demand] shall be submitted to" the appropriate arbitrator.[1] In 1989, the hospital notified the union that, in

1. The CBA created a panel of five pre-selected arbitrators, rotating automatically. The arbitrator to whom notice was to be given was the one whose name was next in the rotation.

contrast to the union's interpretation, it read the CBA as requiring the union to notify the arbitrator simultaneously when filing a demand for arbitration with the hospital.

The union filed a grievance on Murray's behalf on April 5, 1991. The hospital denied the grievance at step four. The union timely presented a demand for arbitration to the hospital on May 1, 1991 but, in keeping with its interpretation of the disputed provision, did not notify the arbitrator. At some uncertain point, the union notified arbitrator Joseph Girolamo who, since he was not the next arbitrator in the rotation, was not the appropriate arbitrator to notify. The hospital, in accordance with its view of the disputed clause, treated the arbitration demand as untimely and refused to arbitrate the grievance. The union therefore filed unfair labor practice charges with the Michigan Employment Relations Commission (MERC).[2]

Since it was not the appropriate forum in which to lodge them, the MERC dismissed the charges for lack of jurisdiction. The union did not refile the charges with the National Labor Relations Board (NLRB), the body that has jurisdiction over such claims. Murray learned of the dismissal of the MERC charges on November 6, 1991 but did not file a charge against the union.

The hospital eventually agreed to arbitrate Murray's grievance in a bifurcated fashion. The arbitrator would first consider whether the grievance was arbitrable despite the union's failure to notify the arbitrator upon making its demand

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2. The unfair labor practice charges alleged that the hospital had unlawfully fired Murray and two other union members — Regina Shorter and Darlene Baker — because of their union affiliation and had violated the CBA by refusing to arbitrate their grievances.

for arbitration. If so, the arbitrator would proceed to consider the merits of the grievance. At the first stage, the union argued, as it does here, that the CBA's provision for notice to the arbitrator does not impose a duty on either party but instead gives both parties the right to notify the arbitrator in order to expedite the proceedings. The arbitrator rejected that argument and concluded that the CBA obligates the union to notify the arbitrator upon demanding arbitration. The arbitrator concluded that the union's failure rendered the grievance non-arbitrable and therefore dismissed it.

Murray sued the hospital and the union, claiming that the hospital had violated the CBA by firing him and that the union had violated its duty of fair representation by failing to notify the arbitrator of its intent to arbitrate his grievance. The parties agreed to hold discovery in abeyance and file cross-motions for summary judgment by December 13, 1993. The parties filed cross-motions for summary judgment on December 13, 1993. Murray, at the same time, moved for leave to file a second amended complaint. The district court granted the union's and the hospital's motions for summary judgment and denied Murray's motions. He now challenges the district court's rulings.

## II.

We review the district court's grant of summary judgment *de novo*. *International Ass'n of Machinists and Aerospace Workers, Local 1770 v. Lourdes Hosp., Inc.*, 958 F.2d 154, 156-57 (6th Cir. 1992). Summary judgment is appropriate if the pleadings, affidavits, and fruits of discovery "show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Murray argues that the union breached its duty of fair representation by failing to satisfy the CBA's arbitrator notice requirement. To succeed, he must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted); *see also United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 584 (6th Cir. 1994).

Murray cannot satisfy this heavy burden. The CBA's arbitrator notice provision is unclear. Whereas other provisions in the CBA impose specific duties on specific parties, the disputed provision does not. Rather, it states, "upon filing of a demand for arbitration, it shall be submitted to [the appropriate] arbitrator." Since the provision does not refer to the union or the hospital, the union's interpretation of it as not imposing a requirement on either party is one sensible construction.

Murray argues, however, that the union's past conduct indicates that it actually knew its reading of the CBA to be untenable. He points to the fact that prior to the Baker case, which arose around the same time as Murray's, the union withdrew arbitration demands each time the hospital objected to the union's failure to notify the arbitrator. It does not follow necessarily that the union's past conduct amounts to a tacit admission that the hospital's interpretation is correct. A variety of unknown factors might have motivated the union in those prior instances. Murray's argument in this regard is further weakened by the fact that the union zealously advocated its

interpretation of the CBA in this case and in the Baker and Shorter cases.

The union's interpretation of the CBA was one reasonable interpretation that happened to advance the union's strategic concerns. Especially since the union vigorously advocated that interpretation, its conduct cannot be called irrational.

Murray also argues that the union's assertion to the district court that it did in fact notify an arbitrator raises the question of whether the union violated its duty of fair representation by failing to present — in the arbitration to determine arbitrability — an available persuasive argument in favor of arbitrability. At arbitration, the union did not argue that it had in fact notified the arbitrator; instead, it argued that the CBA did not obligate it to do so.

While the failure to present an argument might in some cases be deemed irrational conduct, two factors preclude that conclusion in this case. First, in view of the conceded flaws in the purported notice — it was submitted to the wrong arbitrator and cannot be shown to have been submitted in a timely fashion — the arbitrator would have almost surely rejected an argument by the union that it actually provided notice. Moreover, arguing that it actually notified an arbitrator could be construed as an acknowledgment that the CBA required such notice. Such an acknowledgment would have weakened the union's strongest argument, *i.e.*, that the CBA did not require the union to notify the arbitrator. Under these facts, the union's failure to argue that it actually notified the arbitrator cannot be called irrational.

Because we conclude that the union's conduct in the prosecution of Murray's grievance fell well within a "wide range

of reasonableness," we reject Murray's contention that the union breached its duty of fair representation.

## III.

Murray, in his second amended complaint, sought to assert that the union breached its duty of fair representation by intentionally allowing the statute of limitations to run before lodging an unfair labor practice charge with the NLRB. He challenges the district court's denial of his motion to amend his complaint to add this allegation.[3] We review the district court's denial of his motion for abuse of discretion. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). While leave to amend is to be freely granted, Fed. R. Civ. P. 15(a), it is to be denied if the amendment would be futile, would result in undue delay or prejudice to the opposing party, or was brought in bad faith. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In his proposed second amended complaint, Murray alleged that the union acted in bad faith by intentionally concealing and failing to inform him of its negligent misfiling of the unfair labor practice charge with the MERC — rather than with the NLRB — even though the union learned of its misfiling while there was still time to remedy it. We are unable to say that the district court's denial of leave to assert this claim was an abuse of discretion, since allowing the proposed amendment would have prejudiced defendants and would have been futile. Murray filed

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3. While Murray's notice of appeal referred to only the district court's grant of summary judgment, this issue is properly before us because an appeal from a final judgment, such as the district court's grant of summary judgment, draws into question all prior non-final orders. *Caldwell v. Moore*, 968 F.2d 595, 598 (6th Cir. 1992).

his motion on the stipulated date for the submission of summary judgment motions. Granting Murray's last minute motion would have caused defendants to, in effect, start over after having prepared a summary judgment motion and its supporting documents. Since Murray failed to provide a persuasive justification for the delay, it follows that it was undue delay under the circumstances of this case, and that allowing the amendment would have resulted in undue prejudice to the defendants.

## IV.

For the foregoing reasons, we affirm the district court's order granting defendants' motions for summary judgment and its order denying Murray's motion for leave to amend his complaint.

## APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 17, 1995

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 94-1187**

GREGORY MURRAY,

*Plaintiff-Appellant,*

v.

DETROIT RIVERVIEW HOSPITAL, *et al*

*Defendants-Appellees.*

**ORDER**

BEFORE: BROWN, KENNEDY and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

*Appendix B*

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
LEONARD GREEN
Clerk